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July 1, 1996

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Dear Mr. Caton

On behalf of Golden Orange Broadcasting Co., licensee of Station KDOC-TV, Anaheim, California, there are herewith submitted an original and four (4) copies of its Comments in MM Docket No. 96-16.

Sincerely

  
Lawrence N. Cohn

Enclosures

cc: Calvin Brack (w/encl.)

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BEFORE THE

# Federal Communications Commission

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In the Matter of )

Streamlining Broadcast EEO )  
Rules and Policies, Vacating the EEO )  
Forfeiture Policy Statement )  
and Amending Section 1.80 of )  
the Commission's Rules To Include )  
EEO Forfeiture Guidelines )  
\_\_\_\_\_ )

MM Docket No. 96-16

To: The Commission

## Comments

GOLDEN ORANGE BROADCASTING CO.

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July 1, 1996

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### Summary

Contrary to the position tentatively adopted by the Commission in Paragraph 15 of the NPRM, Golden Orange believes that the "strict scrutiny" standard for judicial review of race-based preferences utilized by the Federal Government, as announced by the U.S. Supreme Court in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995), is applicable to Section 73.2080(c)(2) of the Commission's rules ("EEO Rule").

Golden Orange believes that Adarand is applicable to the Commission's EEO Rule because the Commission's claim that its EEO enforcement efforts are "efforts based," rather than "result-oriented" can not withstand analysis. In its implementation of the EEO Rule, the Commission repeatedly undercuts Section 73.2080(a), which prohibits discrimination against any person based on race (among other factors), and encourages broadcast licensees to discriminate against non-minorities. The Commission promotes favoritism toward minorities, whether deliberately or otherwise, in several ways: (1) by its use of EEO numerical "processing guidelines;" (2) by its unfailing analysis of the extent of minority employment for every station whose EEO record is challenged at renewal time; (3) by requiring license renewal

applicants to report the number of minorities hired and promoted during the 12 month period prior to the filing of the renewal application; and (5) by insisting that broadcast licensees consider race in deciding which job applicants should be interviewed.

Even if the Commission's EEO Rule could pass Constitutional muster under the applicable legal standard of review with respect to certain high-level employees at broadcast stations, the only legitimate rationale for the Commission EEO "affirmative action" policies (i.e., the enhancement of "program diversity") does not justify the Commission's enforcement of EEO Rule with respect to the far greater number of broadcast station employees who are in positions where they have little if any ability to influence "program diversity."

Golden Orange believes that the Commission's EEO Rule can not pass Constitutional scrutiny under the Adarand standard because, among other reasons, the Commission has no sound factual basis to support its often-stated assertion that there is a significant correlation between minority employment at broadcast stations and program diversity. In the absence of a solid factual record demonstrating this correlation, the Commission's race-based

policies are not sustainable under the Adarand ("strict scrutiny") standard.

Accordingly, Golden Orange respectfully submits that the Commission should utilize this proceeding to eliminate Section 73.2080(c)(2) of its EEO rules.

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MM Docket No. 96-16

To: The Commission

## Comments

Golden Orange Broadcasting Co. ("Golden"), licensee of Station KDOC-TV, Anaheim, California, by its counsel, hereby submits these Comments in response to the Commission's Order and Notice of Proposed Rulemaking In the Matter of Streamlining Broadcast EEO Rules and Policies, MM Docket No. 96-16 (released February 16, 1996) ("NPRM").

The Commission has expressed the tentative view that the "strict scrutiny" standard articulated by the Supreme Court in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) ("Adarand") is inapplicable to its EEO Rules (NPRM, Para. 15), and has therefore not attempted to justify its EEO Rules under the Adarand "strict scrutiny" test. Golden disagrees with the Commission on this critical issue. Golden believes that Section 73.2080(c)(2) of the Commission's EEO Rule, as currently interpreted and implemented by the Commission, constitutes a racial preference and therefore must be judged under the Adarand "strict scrutiny" test.

Golden strongly urges the Commission to use the instant rulemaking proceeding, not to "streamline" its EEO recruitment rules and policies as proposed in the NPRM, but to reevaluate its tentative position regarding the applicability of Adarand and then to consider whether Section 73.2080(c)(2) of the Rules is constitutionally sustainable under the "strict scrutiny" test of Adarand. Golden believes that this Commission rule is not sustainable under the Adarand standard, and that the Commission must therefore entirely eliminate this provision of its EEO Rule. In support, Golden respectfully states the following.



I. Introduction

Golden's position is premised on the fundamental concept that entities engaged in interstate commerce should not be allowed to discriminate in employment against any individual based on race, color, national origin, religion or gender. It therefore believes that broadcast licensees have the moral and legal obligation to make all employment decisions in a completely non-discriminatory fashion, and it strongly supports the key element of the Commission's EEO Rule -- i.e., Section 73.2080(a), which prohibits broadcast licensees from discriminating, against any person because of race, color, religion, national origin, or gender. Further, Golden believes that the Commission, as an agency of the Federal Government, has a special responsibility not to take any action which requires, suggests or encourages its licensees to discriminate on the basis of race. Golden is filing these Comments precisely because it believes strongly in the principle of non-discrimination, and because it has come to the firm conclusion that the Commission's EEO Rule, as currently interpreted and implemented by the Commission, whether intentionally or otherwise, encourages licensees to discriminate against non-minorities based on race.

A few other introductory comments are warranted. Golden does not intend to suggest that those members of the Commission and the many members of its staff who have been responsible for the creation of the Commission's EEO Rule and its implementation over almost three decades have acted otherwise than "with the best of intentions"<sup>1/</sup> and in a valiant attempt to create equal opportunity for all Americans. However, regardless of the good intentions of the Commission and its staff, Golden has come to the conclusion that the Commission has simply "gone too far," and is now in the untenable position of having a rule which expressly prohibits discrimination based upon race (i.e., Section 73.2080(a)) while simultaneously encouraging broadcast licensees to give preferential treatment, based on race, to members of minority groups (i.e., Section 73.2080 (c) (2)).

It is never easy for any institution to admit error, and then to correct that error. It is especially difficult for an agency of the Federal Government to admit and correct an error which concerns a matter of considerable significance, and which has been formalized into an agency rule, elaborated upon in numerous policy

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<sup>1/</sup> See, Hopwood v. Texas, Nos. 94-50569, and No. 94-50664, U.S. App. Lexis 4710 (5th Cir. 1996).

statements, and implemented in specific situations on hundreds of occasions over the course of many years. However, Golden respectfully submits that this is the daunting task which the Commission now faces. The past is the past. Whatever the legal status of the Commission's EEO Rule prior to Adarand, the legal landscape is now different. The instant rulemaking proceeding offers the Commission an opportunity to make a candid review of its rules and policies in the EEO area. The Commission will not meet its responsibilities by restating general principles and by rehashing justifications for actions taken prior to the Adarand decision. The Commission must squarely, honestly, and justly evaluate its regulations in the EEO area in the light of current law and then act accordingly.

## II. The Adarand Decision

In Adarand, the Supreme Court held that in order to survive scrutiny under the Equal Protection Clause of the 5th Amendment to the U. S. Constitution, any "racial classification" utilized by an instrumentality of the Federal Government must meet the extremely demanding "strict scrutiny" standard of judicial review.<sup>2/</sup> Five of

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<sup>2/</sup> Under the "strict scrutiny" standard, a racial classification will be found Constitutional only if the Federal Government is

the Court's nine justices supported this view, and two additional justices (Scalia and Thomas) were of the view that racial classifications by the Federal Government are per se violative of the 5th Amendment to the Constitution. Id. at 2118-19 and 2119 respectively.

The Supreme Court's decision in Adarand expressly overturned the "intermediate scrutiny" standard of review which had been established by the Supreme Court six years earlier in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 110 S. Ct. 2997 (1990). In Metro, a sharply divided Supreme Court, in a 5-4 decision, upheld this Commission's long-established, and firmly-entrenched policy of awarding "preferences" to applicants in comparative hearing cases based on the extent to which members of racial minorities were principals in the applicant. While the Supreme Court's decision in Adarand did not expressly over-rule the Commission's policy of awarding applicants preferences based in part on their racial composition, it appears extremely doubtful

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able to demonstrate that it is "narrowly tailored to further compelling governmental interests." Adarand, 115 S. Ct. at 2113.

whether the Commission's racial preference policy in the context of comparative hearing cases can survive constitutional challenge.

It is a sobering thought that the Commission's dockets contain many, many cases in which awards of valuable broadcast licenses were made on grounds which were later found to be unconstitutional or (at the very least) constitutionally suspect.<sup>3/</sup> Prudence would therefore caution the Commission to consider seriously the contentions advanced in these Comments that Section 73.2080(c)(2) of its long-established EEO Rule must be judged in accordance with Adarand's the "strict scrutiny" standard, and that fair application of the Adarand standard compels the conclusion that these requirements violate the U. S. Constitution.<sup>4/</sup>

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<sup>3/</sup> The Commission's minority preference policy was not the agency's only preference policy which has been undercut by judicial decisions on constitutional grounds. Three years prior to Adarand, the United States Court of Appeals struck down, as violative of the 5th Amendment to the U.S. Constitution, the Commission's 16 year practice of awarding preferences to applicants in comparative hearing cases based upon the extent to which women were principals of applicants. Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992).

<sup>4/</sup> The Commission asserts that the FCC's authority to adopt EEO rules was "indirectly endorsed" by the Supreme Court in NAACP v. Federal Power Commission, 425 U.S. 662, 96 S. Ct. 1806, footnote 7 (1976) ("FPC"). NPRM, Para. 5. Golden believes that the substance of Commission's EEO rules find little if any support in this comment of the Supreme Court. First, the

### III. The Commission's Treatment of the Adarand Decision in the NPRM

The Commission addresses the implications of the Supreme Court's Adarand decision in Paragraphs 13-15 of the NPRM. The Commission resolutely asserts, as it has asserted many times in the past, that its current regulations in the EEO area are entirely an "efforts-based approach." Id, at Para. 13. The Commission contends that because its rules do not "mandate that broadcasters employ any person on the basis of race ...Adarand does not implicate our EEO program and, therefore, the Commission's EEO program need not be evaluated under the strict scrutiny standard." Id, at Para. 15.

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Court's comment was clearly dicta, as the rules of the Commission were not under consideration by the Court in FPC. Second, the FPC case involved merely the question of the statutory authority of an agency to implement EEO rules, and any "endorsement" which the Court may have given to the Commission's rules should not be interpreted as any statement, whether direct or indirect, regarding the constitutional validity, on substantive grounds, of the Commission's EEO rule. Third, the Commission EEO rules which were in effect in 1976 were less stringently enforced than those currently in effect, and any comment by the Court regarding the validity of the rules in 1976 would be of little applicability to the Commission's regulations and their current interpretation by the Commission. Finally, regardless of the intended scope of footnote 7 of the FPC case, the validity of the Commission's current EEO rules must be judged by the new legal standard established by the Supreme Court in Adarand.

Golden takes issue with the premise of Commission's logic. As Golden will explain below, the Commission's often-stated comment that its EEO rules and regulations are strictly "effort-based" is simply not true.<sup>5/</sup> It asks the Commission to review, with a critical eye, the aspects of its EEO requirements discussed herein. If the Commission will do so, Golden is confident that the Commission will conclude that its EEO rules, as utilized by the Commission in its published decisions and as interpreted by the public are not entirely "efforts-based," and that therefore its rules are subject to the "strict scrutiny" standard of Adarand. If the Commission is unwilling to review its EEO Rule critically, and without any preconceived bias, sooner or later the Commission may find itself in the same position as other public entities and institutions which have recently learned that their best-intended efforts to promote minority participation in American life have "gone too far," and violate the U. S. Constitution.<sup>6/</sup>

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<sup>5/</sup> Based on the premise that its EEO rules are strictly "efforts-based," the NPRM quotes the comments of Walter Delinger, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice at 7 (dated June 28, 1995) in support of its position that the Adarand test is inapplicable. Golden directly addresses Mr. Delinger's comments in Section IV 5, below.

<sup>6/</sup> See, in addition to Adarand, Hopwood v. Texas, supra (holding the University of Texas' preferential admissions policy

#### IV. Argument

Section 73.2080(a) of the Commission's rules states that "no person" shall be discriminated against in employment on the basis of race, color, religion, national origin, or sex. While this provision puts the Commission squarely opposed to racial discrimination against anyone, the plain fact is that other aspects of the Commission's rules, have the inevitable result, whether intended or not, of encouraging broadcast licensees to discriminate against non-minorities on the basis of their race. But the Commission does not satisfactorily defend its implementation of those aspects of its EEO Rule which do encourage and promote the use of racial preferences by its licensees merely by pointing to Section 73.2080(a) which, on its face, prohibits licensees from discriminating in employment matters based on race.

Admittedly, the Commission's EEO Rule is not exactly like those at issue in Hopwood (supra), City of Richmond (supra), or Podberesky (supra), in which public entities and institutions

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unconstitutional), City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706 (1989) (holding the City of Richmond's minority-set aside program unconstitutional), and Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) (holding the University of Maryland's minority scholarship program unconstitutional).



adopted regulations which gave explicit preferences to minorities based on their race. The Commission usually encourages broadcast licensees to give preferences to minorities, not with an explicit rule or directive<sup>1/</sup>, but softly, with a "smile and a wink." In other words, the Commission suggests to licensees that they should do precisely what they are forbidden by law from doing -- namely, to discriminate on the basis of race -- in order to be in the good graces of, or at least to stay out of trouble with, the Commission. The fact, which everyone in the broadcasting industry is well aware of, is that broadcast licensees are being pressured by the Commission into discriminating in favor of minorities and against non-minorities when they make employment decisions. This is how and why it happens.

1. The Commission's Numerical Processing Guidelines

The Commission acknowledges that in evaluating stations' EEO performances at renewal time, it utilizes specific numerical "processing guidelines" to evaluate the station's record of minority employment as reflected on its Annual Employment Reports

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<sup>1/</sup> However, see Section IV 3, below.

(FCC Form 395-B) during the license term.<sup>8/</sup> NPRM, Para. 10. According to the Commission, it uses these standards, together with other information gathered from the station's renewal application, solely for the purpose of determining those stations whose EEO performances are to be subjected to a second, more in-depth inquiry. NPRM, Paras. 10-11. Although the Commission adamantly and repeatedly denies that the numerical guidelines are quotas, the very use of these standards, the mere fact of their existence, and despite the Commission's statements to the contrary, does influence the decision-making process of broadcast licensees.

The filing of a station's license renewal application is not unlike the filing of a Federal income tax return. Even the most contentious and law-abiding licensee/taxpayer does not look with favor upon the possibility that there will be further inquiry concerning the application/tax return from the Commission/IRS. Knowledgeable broadcast licensees want to avoid having to devote

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<sup>8/</sup> For stations with 10 or more full-time employees, the guidelines are "50% of parity" for both minorities and women, both in all positions and in "upper-level" positions. In cases where there are several minority groups in the local labor force, stations are expected to meet the standards both for overall minorities and with respect to the "dominant minority(ies)."

the time and effort which is involved in preparing the detailed report of hires over the preceding three year period which is necessary to respond to a Commission Bilingual letter seeking "additional information." NPRM, Para. 11. Therefore, except for licensees whose employment profiles are comfortably above the Commission's numerical "processing guidelines," there is inevitably considerable pressure to give preferential treatment to minorities (and to a lesser extent to women) to make sure the station's "numbers" meet the Commission's "processing guidelines." Licensees sometime react to this pressure from the Commission by hiring minorities to positions for which they are unqualified. This may not only constitute discrimination against non-minorities, it often leads to a very uncomfortable and unsatisfactory situation for both the licensee and the minority employee.

The pressure to employ minorities exists throughout the license term and inevitably leads to licensees making employment decisions based on racial preferences. This pressure heightens before the payroll period used by each licensee in preparing its Annual Employment Reports, and increases further in the two or three years prior to each station's license renewal filing. The pressure to hire minorities is particularly acute during the 12-

month period prior to filing the station's license renewal application because licensees are required to provide information regarding minority hires for this period in response to Section IV ("Job Hires") of FCC Form 396.

2. The Commission's Use of Station Employment Statistics in Its Renewal Decisions

There is also considerable public scepticism about whether, as the Commission so strenuously asserts (NPRM, Para. 10), the number of minorities a licensee has employed during the license term is used exclusively to assist the Commission in determining whether the station's EEO performance should be subject of more in-depth scrutiny in the license renewal process, or whether these numbers are also used in a "result-oriented" manner. Without fail, Commission decisions resolving license renewal applications which are contested on EEO grounds identify the relevant recruitment area for the station and set forth the percentage of minorities in the civilian labor force, with a further break-down of the percentages for specific minority groups in the labor force (e.g., Blacks, Hispanics, etc.) These Commission decisions also invariably set forth and analyze in the minutest detail the station's employment profile as reflected in the Annual Employment Reports (Commission

Form 395-B) filed during the license term, and include an analysis of the respective percentages of each minority group on the station's staff, both in all (full-time) positions and in upper-level positions.

For example, in a recent decision (In re Application of The Kravis Company, KGTO and KRAV, Tulsa, Oklahoma, Commission 96-175 (released April 25, 1996) the Commission wrote the following (Para. 5, footnote 1):

The license terms of KGTO(AM)/KRAV(FM) ended on June 1, 1990. The Tulsa, Oklahoma Metropolitan Statistical Area ("MSA"), in which the stations are located, includes a 12.6% minority labor force (6.4% Black, 1.3% Hispanic, 0.5% Asian/Pacific Islander, and 4.4% American Indian). The stations' 1984 Annual Employment Report lists three Blacks (9.1%) and one American Indian (3.0%) among 33 full-time employees (12.1%). Among 29 employees in upper-level jobs, the stations had three minorities (10.4%) -- two Blacks (6.9%) and one American (3.5%). In 1985, the stations had 31 employees, including six minorities (19.4%) -- Blacks (9.7%) and three American Indians (9.7%). They had 28 employees in upper-level jobs, including five minorities (17.9%) -- two Blacks (7.1%) and three American Indians (10.7%). In 1986, the station had 32 employees, including five minorities (15.6%) -- three Blacks (9.4%), one Hispanic (3.1%), and one American Indian (3.1%). Among 29 employees in upper-level jobs, there were four minorities (13.8%) -- two Blacks (6.9%), one Hispanic (3.5%), and one American Indian (3.5%). In 1987 the station had 30 employees, including two minorities (6.7%), both Black. Among 27 employees in upper-

level jobs, they employed one Black (3.7%). In 1988, the stations had 26 employees, including two Blacks (7.7%). One Black was among the 24 upper-level employees (4.2%). In 1989, the stations had 24 employees, including two Blacks (8.3%). One Black was among the 22 upper-level employees (4.6%). In 1990, the licensee had 24 employees, including three minorities (12.5%) -- two Blacks (8.3%) and one American Indian (4.2%). The 22 upper-level employees included two minorities (9.1%) -- one Black (4.6%) and one American Indian (4.6%).

This analysis was made in the context of analyzing the stations' EEO performance during the license term, and was not related to an evaluation of the license's "efforts."

The plain and inescapable inference which is drawn from the fact that Commission decisions which resolve allegations of EEO rule violations always include a statement of the minority composition of the relevant labor force followed immediately by a detailed analysis of the licensee's employment record as reflected in its Annual Employment Reports is that the Commission does analyze the station's minority employment record, presumably in conjunction with its publicly-acknowledged numerical "processing guidelines," to determine whether the station has performed in a satisfactory manner during the license term and, if not, what the appropriate sanction should be. Otherwise, why is this detailed

analysis of the station's minority employment record regularly included in Commission decisions? If, as the Commission repeatedly asserts, the numerical processing guidelines are used strictly as an internal processing technique to determine whether second-level scrutiny is appropriate (see NPRM, Para. 11), recruitment area labor force data and information reflecting the station's employment of minorities would have no relevance once the decision had been made by the Commission whether further scrutiny of the licensee's EEO record was needed. Stated otherwise, there is no reason for the Commission to include this information in the text of Commission decisions unless it is in fact being used to evaluate the licensee's performance. The fact that this information is regularly included in the Commission's EEO decisions strongly suggests that when the Commission evaluates a licensee's EEO record its analysis is not strictly "efforts-based," and that sanctions are meted out, at least in part, based on whether the licensee has employed members of minority groups in accordance with some pre-established numerical standard.

This, of course, has not been lost on broadcast licensees. Licensees who are very much opposed to discriminating against anyone based on the basis of race, have "gotten the message" which

the Commission's decisions clearly send, whether intentionally or otherwise. The message, which overrides the Commission's repeated assertion that its EEO Rule prohibits discrimination against any person because of race, color, national origin, or sex, is that the Commission does care very much about each station's "numbers," and that prudent licensees should take whatever steps are necessary, including if necessary making hiring decisions on the basis of preferences for minorities, if they want to remain in the Commission's good graces.<sup>2/</sup> This message is reinforced by Section 73.7080(c)(3) of the EEO Rule which urges each licensee to "evaluate its employment profile" by "comparing the composition of the relevant labor area with [the] composition of the stations' workforce." The unfortunate result is that regardless of what the Commission intends, many broadcast licensees are severely pressured to make employment decisions in a racially-biased manner to meet

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<sup>2/</sup> The Commission contends that it does not "require that the proportion of minorities or women employed equal their presence in the labor force or even that any certain percentage of an entity's staff be comprised of minorities or women." NPRM, Para. 7. That is not the point. The point is that Commission decisions show that the Commission expects licensee's to employ minorities and its use of statistics comparing the minority composition of each station's labor force with the station's employment profile gives the clearest possible indication that "the numbers" are at least a significant consideration when the Commission makes decisions in EEO cases.



what the licensees believe, with good reason, are the actual standards by which they will be judged by the Commission at renewal time.

3. The Commission's Use of Interview Pool Data to Sanction Licensees

Over the course of the past years, the Commission has focused its evaluation of stations' EEO records on such matters as the frequency with which recruitment sources were utilized for open positions, the extent to which minority-oriented recruitment sources were used for recruitment purposes, the extent to which the recruitment sources utilized by the licensee actually supplied minority job applicants, and (at least implicitly) the extent to which the station actually hired minorities (i.e., FCC Form 396, Section IV), employed minorities (i.e., FCC Form 395-B), and promoted minorities (i.e., FCC Form 396, Section V) to the station's staff. Recently, however, the Commission has added a new element to its consideration of licensees' EEO "efforts"; namely, the extent to which minorities have been included in the station's interview pools. See, e.g., Northeast Kansas Broadcast Service, Inc., KTKA-TV, Topeka, Kansas, FCC 96-97 (released April 5, 1996) ("Northeast"). This is a watershed development, and carries with it grave constitutional implications.